The Private Equity Review

Fifth Edition

Editor
Stephen L Ritchie

Law Business Research

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THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

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CONTENTS

EDITOR'S PREFACE

The fifth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2015 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of declining growth in China, Brazil and other developing and emerging markets, increased volatility in commodity, stock, currency and other financial markets, and deflation concerns in developed countries. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2016, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this fifth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2016

Chapter 17

POLAND

Marcin Olechowski, Borys D Sawicki and Jan Pierzgalski[1]

I OVERVIEW

i Deal activity

Poland is the largest central and eastern europe (CEE) economy, with a stable banking sector, active capital market organised by the leading stock exchange in the region (Warsaw Stock Exchange (WSE)) and an established legal framework adjusted to the European standards. Poland has consistently maintained growth during the past 25 years, including during the recent world financial crisis. A positive macroeconomic environment and a well-developed and cost-effective labour market support the strengthening of Polish businesses, creating many unique opportunities for investors.

In 2014,[2] 78 private equity investments of the aggregate value of €250.9 million were made into companies domiciled in Poland.[3] While the number of investments was still relatively high (compared with, e.g., 58 investments in 2007, 71 in 2008, 55 in 2011, 74 in 2012 and 89 in 2013), their total value was the lowest in the last eight years – in the record 2011 private equity investors invested in Polish portfolio companies €678.4 million, in 2013, €380 million. All 14 new control transactions (buyouts) with an aggregate value of €161.4 million were targeted at small companies (i.e., with a value lower than €15 million) and mid-market businesses (i.e., with a value of between €15 and €150 million). The total of 16 new growth investments in 2013 had a value of

1 Marcin Olechowski is a partner, Borys D Sawicki is a senior counsel and Jan Pierzgalski is an associate at Sołtysiński Kawecki & Szlęzak.

2 2015 figures are not yet available.

3 Source: EVCA, Yearbook 2015 Europe.

€65.4 million. Due to a significant drop of the investment's value Poland lost its title of the biggest private equity market in CEE, hosting only 19 per cent of the investment in the region in the past year compared with almost half of the investments in 2013.[4]

2014 was the second consecutive year of exits. A total of 35 divestments were valued in the aggregate at €529.7 million.[5] This was the highest value of divestments, in the past eight years. In comparison, there were 24 divestments in 2012 (from investments valued in total at €184.3 million), 21 in 2012 (€52.8 million) and 36 in the previous record year 2013 (€284.7 million). The most common exit route in Poland is a trade-sale; in 2014, over one-third of exits were performed by sale to an industry investor. However, in terms of value of divestments, the leading way was a sale to financial institutions, contributing to as much as 41 per cent of total value of exits (but in only two transactions). In 2014 there was 10 exits via public market – five IPOs and five sales of quoted equity (compared to none in the previous two years) with an aggregate value of €60.2 million. Management buyouts were exit routes in approximately 13.9 per cent of all divestments; however, these contributed only 3.8 per cent of income from all of the exits. Secondary sales were the least popular exit route in 2014, where only one investment ended with a sale to another private equity house (with a value of €1.1 million).

The fast-moving consumer goods, media and IT, health-care and business services are the sectors most preferred by private equity investors.[6]

ii Operation of the market

Management equity incentive programmes

Management equity incentive programmes are commonly used to align investors' and managers' interests. Typically, the structures used for such programmes are based either on convertible bonds or subscriptions warrants entitling managers to subscribe for new shares in the company's share capital upon fulfilment of the conditions described in the incentive programme. Managers usually benefit from a discount amounting to the difference between the subscription value of the shares and their fair market value. In the case of listed companies, managers are often entitled to subscribe for shares for a pre-determined fixed price. The goals that managers are to achieve depend on the investor's objective in the investment; typically, goals in private companies include reaching a certain EBITDA or amount of incomes.

Other incentive programme structures may be based, for example, on share options or phantom shares.

Sale process

The sale process in Poland is typical for 'young' private equity markets. Half of the potential investment opportunities that are analysed by Polish investment funds are reported by business owners (or their financial advisers) seeking opportunities to sell the

4 EVCA, Central and Eastern Europe Statistics 2014, August 2015.

5 The value of divestment is reported in accordance with the value of investment; thus, these do not show the real value of the exit transition and the return from the investment.

6 KPMG Poland, 'Rynek Private Equity w Polsce: fakty a opinie', 2014.

business, or to find a new source of financing or a strategic partner.[7] Investment funds actively monitor the market and seek potential investment opportunities (43 per cent of analysed investment projects were found by funds' investment teams). The majority of investment opportunities are businesses still led by their original founders (59 per cent). The second group of investment opportunities are corporates' non-core businesses (14 per cent) and the third are secondary sales (13 per cent).[8]

In the case of investing in the original owners' businesses, the sale process often involves prior restructuring of the target. This is because many of the 'family' businesses, especially those that were established still in the 1990s, continue to be run as private businesses of individuals (primarily due to tax reasons). A change in the form of running a business and the enterprise's contribution into the company requires diligent separation of business assets from personal property, and identification of debts connected with the business.

The Polish M&A market is relatively professional, and local sale processes are largely aligned with general European practice. The majority of sellers (however, still not more than 70 per cent) are supported by financial advisers, and up to 50 per cent of sales are conducted as competitive auctions.[9] However, negotiations with first-generation owners of small and medium-sized businesses (which are typical for the Polish market) tend to be time-consuming, especially due to the owners' overestimation of the enterprise's value.[10]

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

Types of companies

The vast majority of investors' targets in Poland are companies governed by the Polish Commercial Companies Code (CCC). Thus, the CCC creates the basic legal frameworks regulating control over the target and the rights of a minority investor.

Companies under the CCC are divided into two general classes: partnerships (which are registered partnerships, professional partnerships, limited partnerships, and partnerships limited by shares (SKA)) and commercial companies (limited liability companies and joint-stock companies). Except for SKAs, partnerships are tax transparent; however, no corporate veil is in place to protect the partners. On the other hand, running a business in the form of a commercial company is connected with double taxation (first to be paid by the company and then by the shareholder) but provides the shareholder with the benefit of the corporate veil.

7 Ibid.

8 Ibid.

9 Ibid.

10 In accordance with an interview with a Polish Private Equity and Venture Capital Association (PSIK) representative.

In consequence, a business whose scale may attract private equity investors is usually conducted in the form of a commercial company rather than a partnership (with the significant exemption of first-generation 'family' businesses).

Another significant factor that influences the preferable form for conducting business are the statutory restrictions on how Polish law-governed investment funds invest. Under the Investment Funds Act (IFA), closed-ended investment funds cannot invest in partnerships, while open-ended investment funds cannot invest in partnerships or limited liability companies. Although these restrictions apply only to Polish investment funds, other private equity investors often also prefer to invest in commercial companies.

Until October 2015, SKAs – combining the features of a partnership and classic joint-stock company – constituted an attractive form of investment vehicle, since they could be structured to provide an investor with the benefits of both tax transparency and the corporate veil. Following changes in the taxation regime, SKAs ceased to be tax transparent and currently provide no, or limited, advantages over 'classic' joint-stock companies for private equity investors.

Control in joint-stock companies

In Polish joint-stock companies, the level of a shareholder's control over the company is connected with the percentage participation of the shareholder in the total number of voting rights. In a private joint stock company with 'default' corporate governance rules derived from the provisions of the CCC, a general assembly (which consists of all of the shareholders) appoints the supervisory board members (while the supervisory board nominates the management board), has the power to dismiss members of the supervisory board and management board, and has the power to adopt critical resolutions for the company. Obtaining basic control over the company requires the acquisition of more than a 50 per cent stake; however, some important resolutions require a higher majority.

Reaching a 50 per cent plus one share shareholding allows the shareholder to appoint the majority of the supervisory board, and indirectly gives the shareholder control over the personal policy of the company. The CCC prohibits shareholders from giving management or supervisory board members binding instructions; however, due to the fact that the general assembly has the power to dismiss the company's managers, shareholders have in practice indirect influence over the policy of the supervisory and management boards.

Although the management board runs the daily operation of a joint stock company (shareholders are not entitled to act on behalf of the company), undertaking the majority of fundamental corporate actions requires a resolution of the general assembly. A general assembly resolution is required to, *inter alia*:

a amend the statutes;
b appoint supervisory board members;
c approve financial statements and the management board's annual reports;
d dispose, lease or encumber a company's enterprise or its organised part;
e acquire or dispose of real estate (unless the statutes provide otherwise);
f issue bonds or subscriptions warrants;
g increase share capital and issue new shares;
h allocate profits;

i exclude a shareholders' pre-emptive rights (the required majority of votes is four-fifths);
j dissolve the company;
k merge, demerge or transform the company;
l change a private company into a public company; or
m change a public company into a private company (the required majority of votes is four-fifths).

The CCC provides for several regulations aimed at protecting minority shareholders. Most notably, shareholders with at least a 10 per cent shareholding may request that an extraordinary general assembly be convened and have influence on the agenda of each general assembly. A 20 per cent threshold of shares in the company allows a minority shareholder (or group of shareholders) to request a vote on the appointment of supervisory board members in groups. In the case of voting in groups, a group of shareholders may vote individually on the appointment of one (or more) supervisory board members, notwithstanding the provisions of the statutes governing the election of the supervisory board members; as a result, minority shareholders who are able to create a voting group may influence the composition of the board. Each shareholder has a right to challenge resolutions of the general assembly, management board or supervisory board. A minority shareholder's level of influence on the company may be further extended by the statutes of the company, which may, for example, provide for the shareholder's individual right to appoint a number of supervisory or management board members, or both, or convene a general assembly.

ii Fiduciary duties and liabilities

The CCC does not expressly state the fiduciary duties of a shareholder towards the commercial company or other shareholders. Shareholders exercise their rights by voting on resolutions at the general assembly. Resolutions may be challenged by other shareholders, and members of the management or supervisory boards (or both), which creates a mechanism of control over the majority shareholder's actions. A resolution may be challenged if it contravenes the statutes of the company or good practices and harms the interests of the company, or if it is aimed at harming a shareholder. The general clause of 'good practices' allows the majority shareholder's actions to be opposed in a wide range of circumstances if the company's or other shareholders' interests are harmed. Although there are no specific provisions of law governing the matter, legal doctrine and jurisprudence have developed the concept of a duty of loyalty, which shareholders (especially a majority shareholder) owe to the company and other shareholders.

Due to the nature of commercial companies, the liabilities of a shareholder towards a limited liability company or joint-stock company are, generally, limited to the proper fulfilment of an obligation to make a contribution to the company (in exchange for shares). In the case of an acquisition of shares, the acquirer is jointly and severally liable for the contribution with the seller. A shareholder is also responsible towards the company or other shareholders in accordance with the general principles of civil law (i.e., for damages caused by illegal actions).

Company officers (members of the management and supervisory boards, liquidators) are personally liable for the damage caused to the company by their actions or omissions contrary to the law or the statutes, unless they were not at fault. Company officers should perform their duties with higher standards of care connected with the professional nature of their positions; they should act diligently, reasonably, cautiously and with foresight, and anticipating the results of undertaken actions. They are also obliged to act in the best interests of the company (which is independent from the individual interests of shareholders) and treat shareholders equally. Management board members cannot conduct a competing business activity without the company's consent and are obliged to refrain from performing duties in the case of a conflict of interest. Shareholders, the general assembly and the supervisory board are not entitled to give the management board or its members binding instructions with respect to the management of the company's affairs.

Management board members in limited liability companies may become liable for the obligations of the relevant company – jointly and severally with the company – if enforcement proceedings against that company are ineffective and the managers did not timely file for a declaration of bankruptcy (the liability may be avoided if they demonstrate that despite the application not being filed, the debtor has not suffered damages).

Private equity investments (Polish or foreign) in regulated financial institutions are limited to smaller stakes and smaller target institutions by the current policy of the financial services regulator (KNF). This is largely because the suitability criteria applied by the KNF in assessing acquisition of controlling stakes usually include the requirement for investors to commit to a long-term investment horizon, as well as capital and liquidity support that is not compatible with many private equity investors' policies.

iii Regulations applying to foreign investors

Poland, as a Member State of the European Union, forms part of the European Union's internal market and aims to guarantee, within the framework of applicable regulations, the EU's 'four freedoms' (i.e., the free movement of goods, capital, services and people).

Though the obvious beneficiaries of Poland's membership in the EU are entities from the remaining 27 EU Member States, Poland sets out very few barriers for investors from non-EU countries, as evidenced below.

The principal remaining limitations on foreign investment are found in the Act on Acquisition of Real Estates by Foreigners (AAREF). Under the AAREF, if a foreigner (i.e., an individual foreign citizen, a legal person with its registered seat outside of Poland, or a company domiciled in Poland but controlled by a foreign entity) acquires real property or obtains control over a company holding real property, a prior approval of the Ministry of Internal Affairs is required (under pain of nullity).

The AAREF, subject to some minor exceptions, does not apply to foreigners from the EEA and Switzerland. It also does not apply to Polish law-governed investment funds (regardless of the sponsors' domicile) or to investing in public companies listed on the WSE. Other foreign investors may decide to operate through holding companies incorporated in an EEA country, usually in Luxembourg or Cyprus, in order to avoid the application and requirements of the AAREF.

In 2015 a new Act on Control over Certain Investments (ACCI) entered into force. The purpose of introducing the ACCI was to give the Polish government a tool with which to control investments (in particular, foreign investments) in companies that are strategic for national interests and security. In general, the regulation follows similar solutions established in other European countries. According to the ACCI, acquisition of shareholding in companies indicated in secondary regulation issued by the government above certain thresholds (the lowest is 20 per cent) or acquisition of its enterprise require previous notification to the Ministry of the Treasury, which can oppose the transaction. Lack of notification or acquisition contrary to the opposition results in the invalidity of the transaction and is sanctioned with a fine of up to 100 million zlotys or imprisonment for up to five years. Six months after enacting the ACCI, no secondary regulation specifying protected entities has been issued, thus in practice the ACCI cannot be applied to any transaction.

iv Tax matters

The most effective structures for tax optimisation of business activity carried out in Poland are based on Polish closed-end investment funds, Luxembourg SCSps and Polish partnerships (registered or limited). If properly structured and implemented, they should allow for an exemption from income tax for most of the profits from business activities carried out in Poland. In the case of foreign investors, distribution of these profits may also be exempt. Alternatively, due to the fact that implementation of such models is relatively expensive, investors may try to introduce similar optimisation schemes based on foreign investment funds. However, the possibility of the exemption of these funds from income tax is continuingly subject to disputes with the Polish tax authorities. It is worth mentioning that some of these disputes were positively resolved for taxpayers by the administrative courts.

In many cases, holding models effectuated by private equity managers are not aimed at total exemption from taxation of income. They are rather targeted at a lowering of the tax base in Poland. Despite a recent 'tightening' of the CIT law, some solutions in this regard are still available. The most common are based on an increase for tax purposes of the value of trademarks, utility models and other intangible assets, or utilisation for tax purposes of goodwill and increased market value of ongoing concerns. Some of these solutions are based on the introduction of tax groups into the holding structures.

It is still possible for Polish and foreign investors to implement tax-effective solutions allowing for an exemption from Polish income tax for capital gains from the disposal of shares in holding and operating companies. There are also several optimisation tools in indirect taxes (e.g., VAT, transfer tax) and custom duties, especially related to creation of a more efficient supply chain, reduction of VAT rates or a lowering of the amount of custom duties.

On the other hand, both current and potential investors should be aware of numerous amendments to the Polish tax laws. Beginning from 1 January 2016 the 'small' anti-abuse clause was introduced into the Polish CIT Act. It aims to deny an exemption of dividends from income tax if such an exemption leads to non-taxation or reduction of the tax base without the proper business justification. Since 1 February 2016 a tax on financial institutions enters into force. The tax imposes an obligation on banks and other financial and insurance institutions to pay a special monthly levy of 0.0366 per cent on the value of an institution's assets. Additionally, beginning from 1 January 2017, more information on related-party transactions will need to be reported by taxpayers as a result of new transfer pricing regulations.

Finally, the new government plans to introduce the general anti-abuse clause into the Polish tax system. If adopted in the proposed way it may significantly reduce the scope of tax-effective solutions and structures that can currently be implemented in Poland. The investors should also be aware of plans to significantly change the Polish VAT law as well as to introduce retails sales tax.

III YEAR IN REVIEW

i Recent deal activity

Although no statistical data for 2015 are available yet, market participants and observers indicate that 2015 has continued to see the market dynamics observed in 2014, with private equity funds preferring to concentrate on exiting investments rather than entering into new ones – 40 per cent of the investors declared that in the first half of 2015 they would focus on the sale of their portfolio, while only 20 per cent intended to increase acquisition activity.[11] The investors also expect that the biggest competition between the acquirers will be in mid-market enterprises sector.[12]

The expected continuing low level of investments is connected with the end of the investment period for many private equity funds active on the Polish market, and ongoing new fundraising round. In addition, fundraising now takes longer than it did in the past (with the fundraising phase currently taking up to even 18 months, compared with just a few months some years ago[13]). There were also only a few major transaction opportunities on the market, and private equity funds were forced to concentrate on a higher number of smaller investments.

A characteristic feature of the Polish private equity market is the lack of involvement of public entities in fundraising or investing. In Poland, the only public source of financing on the private equity market is the National Capital Fund (KFK), a fund of funds sponsored by, *inter alia*, the government. The KFK manages €200 million of funds and is focused only on small venture capital investments, providing up to 50 per cent of the acquisition financing. Open pensions funds are, in turn, restricted from investing on the private equity market. Insignificant participation of entities financed from public sources leads to lower competition between private equity funds and increases the chances of making an investment at a bargain price, which should attract foreign investors' attention.

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11 Deloitte Poland, CE Provate Equity Confidence Survey, May 2015.

12 Ibid.

13 In accordance with an interview with a Polish Private Equity and Venture Capital Association (PSIK) representative.

ii Financing

Due to the lack of 'mega-deals' on the Polish private equity market over the past few years, acquisition financing structures have remained rather simple. The typical structure of financing consists of investor's equity, banking loans (senior debt in the case of other financing) or other sources of financing (e.g., bonds). According to market surveys, 86 per cent of private equity investors consider that debt financing is easily available and does not pose an execution risk.[14] Moreover, 33 per cent of investors expected that in the first half of 2015 debt financing will become even more available.[15] The Polish banking sector is relatively strong, having avoided the global financial sector crisis. The level of leverage in Poland (and in the CEE generally) has never reached the pre-crisis levels achieved in Western Europe. In addition, the percentage participation of equity in capital structures in the CEE (including Poland) was reported to be 20 per cent higher than in Europe;[16] the typical loan-to-value ratio for investments in Poland does not exceed 50 per cent.

Polish investment funds are subject to limitations on incurring debt. Closed-ended funds may only obtain loans or credit from banks, foreign banks or credit institutions.[17] Other debt financing available for closed-ended funds is the issuance of bonds, but only with a value not exceeding 15 per cent of the net value of fund's assets. The total value of debt incurred by closed-ended funds (both in the form of credits and loan facilities and bonds) must not exceed 75 per cent of the net value of a fund's assets. Debt financing restrictions are more stringent in the case of open-ended funds, which may only obtain credits and loans of a maximum value of up to 10 per cent of a fund's net assets, with the repayment date being no longer than one year after acquiring the debt financing, and only from Polish banks or credit institutions.

In terms of legal documentation, facility agreements are typically patterned after the Loan Market Association standard documents with the usual set of clauses. Security documents are in turn local, but there is a well-established practice with regard to both their structuring and the composition of a security package. Depending on the available assets, the package usually consists of a share pledge, asset pledge, account receivables pledge or assignment, and mortgage. It is often coupled with a corporate guarantee and a voluntary submission to enforcement, which is not a security instrument in the strict sense, but allows for faster satisfaction of the creditor.

During 2015 the new Act on Bonds entered into force, significantly changing the previous legal regime. Although the new Act introduced a number of legal developments and novel constructions into Polish law (e.g., a bondholders' meeting), as well as

14 KPMG Poland; see footnote 6.

15 Deloitte, see footnote 11.

16 PSIK, 'Time for another look – Central & Eastern Europe Private Equity', 2013.

17 According to the Polish Banking Law, credit institutions are entities whose registered office is outside the Republic of Poland, but in another Member State of the European Union, and who are conducting activity in their own names and for their own account, on the basis of authorisation of competent supervisory authorities, consisting of accepting deposits or other resources entrusted under any redeemable title and consisting of granting credit or issuing electronic money.

improving existing structures, such as those pertaining to administrators of security interests (security agents), a significant part of amendments merely reflected established market practice. The new regulations were designed to activate the Polish corporate bonds market, however, at the beginning of 2016 it is still too early to verify whether this has been achieved.

iii Key terms of recent control transactions

Key legal terms of control transactions on the Polish market are rather standard. The most important points are the mechanics of transaction, conditions precedent, shareholders' mutual obligations and corporate governance, as well as sellers' liability for representations and warranties.

The scope of legal documentation required to effect take-over transactions varies for investments in which the investor acquires 100 per cent of shares and those in which the investor acquires a controlling stake but the other shareholder (or shareholders) remains in the target company. The latter requires execution of an investment agreement regulating the mutual commitments of the acquiring investor and the shareholder regarding their involvement in the target company and describing its corporate governance structure. Under Polish law, investment agreements are of contractual effect only, which means that voting contrary to the agreement constitutes a breach of an obligation towards the other shareholders, which may result in liability for damages or an obligation to pay contractual penalty, but which is valid and has no impact on the effectiveness of the adopted resolution. Thus, the parties will usually strive to specify additional rights of the shareholders directly in the company's statutes, because a resolution adopted in breach of the statutes may be effectively challenged before a court. Commonly, such additional rights of the shareholders will include the right to appoint part of the management or supervisory boards members (or both), in order to monitor the company's regular business activity; and the establishment of a blocking minority in order to protect the shareholders from the loss of investment value (e.g., in the case of adoption of resolutions approving the disposal of key assets) and from the dilution of their corporate rights. On the other hand, the controlling investor will usually aim to structure the statutes in such a way that the company officers appointed by it may freely conduct the company's day-to-day business, and to have the majority required to adopt most of the resolutions to avoid deadlocks. Investment agreements will also typically provide for regulations facilitating exit from the investment, such as tag-along and drag-along mechanisms, rights of first refusal and provisions facilitating a possible IPO in the future (e.g., regarding the obligation to adjust the statutes accordingly).

Other key terms of a share purchase agreement include representations and warranties, which are usually extensively negotiated between the parties as the scope of liability of the seller depends primarily on the wording of the contract in this regard, as well as conditions precedent, which determine the mechanics and timing of the closing of the transaction. Typical conditions precedent include subscription for shares in the increased share capital, registration of amendments to the statutes with the commercial registry and obtaining concentration approval from the antitrust authority.

Liability caps range on average between 15 and 25 per cent of the purchase price (with, however, 100 per cent of the purchase price as the cap for liability on title). Representations and warranties insurance is more and more frequently considered as a possibility; however, it is still not much used in practice.

iv Exits

In the opinion of private equity investors, the most likely type of exit from an investment is a trade sale to a European strategic investor outside the CEE.[18] Hardly any investors believe that a strategic acquirer will be from Poland (5 per cent), CEE (6 per cent) or outside Europe (5 per cent). The second most likely exit route is a secondary sale, and the third an IPO. A buyout by the other shareholders is deemed to be the least likely option.

IV REGULATORY DEVELOPMENTS

i Investment funds

Polish investment funds operate in accordance with the IFA. There are three basic types of investment funds: open-ended, specialised open-ended and closed-ended. Each investment fund type must be managed by an investment fund management company (TFI). Both investment funds and TFIs are subject to the supervision of the KNF. Establishment of a TFI or an investment fund requires the obtaining of a licence from the KNF. The IFA provides for a number of limitations as regards types of investments that an investment fund may carry out, as well as for requirements as to the diversification of risk. If a TFI or an investment fund managed by a TFI breach a provision of law, and especially of the IFA, or infringe a fund's statutes or the terms and conditions of the licence (e.g., if the investment fund invests contrary to the IFA or its statutes), the KNF may impose a financial penalty of up to 500,000 zlotys on the TFI or cancel the licence.

Although at the beginning of 2015 the Ministry of Finance published a new draft of an amendment to the IFA that will implement the Directive 2011/61/EU on Alternative Investment Fund Managers into Polish law, it has not been adopted yet (please refer to the Poland Fundraising chapter for more details).

ii Antitrust issues

Larger-scale transactions that may influence the market come under the purview of both the Polish (the President of the Office of Competition and Consumer Protection (UOKiK) and European (the European Commission) competition authorities. Any M&A transaction, subject to statutory turnover thresholds, may require competition clearance. If the turnover thresholds are exceeded, Polish antitrust law requires prior notification to the UOKiK on the intention of concentration. Until the UOKiK issues a decision allowing the transaction (or the lapse of the statutory deadlines for the UOKiK

18 KPMG Poland; see footnote 6.

to issue the clearance, which are one or four months depending on the complexity of the transaction), the acquirer should refrain from closing the deal. Antitrust issues are especially relevant in the case of a trade sale exit.

V OUTLOOK

We believe that, overall, the Polish private equity market has significant potential for further growth.

Poland is typically the largest CEE private equity market – in 2014, the share of Polish exits of the total amount of exits in the region amounted to as much as 42 per cent, while the share of Polish investments amounted to 19 per cent (a decrease from an almost 50 per cent share in 2013).[19] Poland still hosts the highest number of companies invested. At the same time, the value of private equity investments in Poland to the country's GDP amounted to only 0.06 per cent, which is significantly less than the European average which is 0.27 per cent. These two factors, when combined, suggest that the already large market should continue to expand. A high average rate of return on investment (2.78 over the past decade) adds to the positive picture of Poland as the place to invest.[20]

19 EVCA, 2014 CEE Report.

20 Ibid.

Appendix 1

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Dr Marcin Olechowski leads the banking and finance practice of Sołtysiński Kawecki & Szlęzak. He advises clients on complex bank and financial regulatory matters and represents them in proceedings in front of the Polish financial markets regulator. His transactional experience includes a broad range of financing transactions, as well as financial sector M&A. In addition to his banking and finance practice, he is involved in international arbitration work and has represented clients in a number of high-stakes international commercial and investment arbitrations under Vienna, LCIA, UNCITRAL and ICC Rules. Dr Olechowski combines his professional career with academic work, and regularly lectures and publishes on issues of banking, civil and commercial law, as well as international arbitration.

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Borys D Sawicki joined SK&S in 1998 and specialises in banking and finance transactions, focusing on project finance and other structured financings. His area of expertise also includes leveraged finance transactions. He has been working closely for several years with the European Bank for Reconstruction and Development, providing advice in the fields of project finance, local self-government regulations, public aid and public procurement laws. In the field of corporate law, he has successfully completed a number of mergers and acquisitions of entities of various sectors and provides day-to-day corporate advice to numerous clients of the firm.

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